STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF MAPLE FOREST and MICHIGAN TOWNSHIP PARTICIPATING PLAN, Plaintiff/Counter-Defendant, v CLEARWATER DRILLING, LLC d/b/a JIM'S WELL DRILLING, Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant, v HOME-OWNERS INSURANCE COMPANY, Third-Party Defendant-Appellee.	UNPUBLISHED May 29, 2014 No. 314798 Crawford Circuit Court LC No. 11-098466-NI

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant/counter-plaintiff/third-party plaintiff Clearwater Drilling, LLC ("Clearwater") appeals as of right from a final judgment issued following a non-jury trial denying it the relief it sought in its third-party complaint. Clearwater further argues that the trial court erred by granting in part third-party defendant Home-Owners Insurance Company's ("Home-Owners") motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), and denying Clearwater's motion for reconsideration. We affirm in part, and reverse and remand in part.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The facts of this case were well summarized in the trial court's opinion and order granting in part and denying in part Home-Owners' motion for summary disposition:

Maple Forest Township had contracted with Clearwater Drilling for the installation of a new water well at the Maple Forest Township Hall. . . .

> . . . [I]n September of 2010, Clearwater began drilling for the new water well. The drilling was accomplished in two steps; [f]irst, Clearwater used a drilling rig to create a hole to a depth of 50 feet. While the hole for the well was being drilled—in order to keep the hole from collapsing before a well-pipe could be inserted—a mixture of water and bentonite was sprayed into the hole under pressure. While drilling, the well rig operator noticed that the bentonite mixture was being pumped into the hole at a rate which was faster than expected. As it turns out, Clearwater had indeed drilled the well into one of the two [existing] septic fields. The pressurized bentonite solution was forced through the septic system and flooded the township hall.
>
> Maple Forest Township brought suit against Clearwater to recover for the damage that the septic flood caused to the township hall. Clearwater requested that its insurance carrier, Home-Owners, provide defense and indemnity coverage under the general commercial liability policy which Clearwater purchased from Home-Owners. Home-Owners refused. Clearwater in turn brought a third-party suit against Home-Owners. Home-Owners asserts that a pollution exclusion is included in the policy, and that the exclusion excuses Home-Owners from providing coverage to Clearwater for the action brought by Maple Forest.

The insurance policy at issue provides in its Commercial General Liability Insurance Coverage Form as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. . . .
>
> The policy further provides that "[t]his insurance does not apply to:"
>
> **(f) Pollution**
>
> **(1)** "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
>
> * * *
>
> (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing, or treatment of waste; . . .

The policy defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The policy also contains an Upset and Overspray Coverage Endorsement ("overspray endorsement"), which provides in pertinent part as follows:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

It is agreed the coverage for "property damage" liability with respect to your operations is extended as follows:

1. COVERAGE

We will pay those sums which you become legally obligated to pay for "property damage" caused directly by immediate, abrupt and accidental:

* * *

b. "Overspray" during your application or dispersal of "pollutants" which are intended for and normally used in your operations. The operations must be in compliance with local, state, and federal ordinances and laws.

2. EXCLUSIONS

a. With regard only to the coverage provided by this endorsement, Exclusion **f.** of **Section I – Coverage A – Bodily Injury and Property Damage Liability** is deleted and replaced by the following:

f. Pollution

Any loss, cost, or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of "pollutants".

However, this paragraph does not apply to liability for damages because of covered "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

After a hearing, the trial court granted in part and denied in part Home-Owners' motion for summary disposition under MCR 2.116(C)(10). The trial court concluded that Home-Owners

did not have a duty to defend or indemnify Clearwater with respect to Maple Forest Township's claim for property damage under § I.A.1.a. of the policy because coverage was excluded under § I.A.2.f(1)(b). According to the trial court, there was no question of fact that any damage to the township hall was caused by a "pollutant" because it was undisputed that the bentonite solution traveled through an active sewer line and mixed with human waste before entering the township hall, thereby converting the bentonite solution into sewage and therefore, into a pollutant under the policy.

With respect to the overspray endorsement, the trial court held that there were genuine issues of fact as to whether Maple Forest Township's claim was covered under the endorsement, stating in part that there was at least a question of fact as to whether the bentonite solution itself was a "pollutant" when Clearwater dispersed it. However, the trial court further held that Home-Owners' duty to defend Clearwater from lawsuits under § I.A.1.a. of the policy did not extend to the defense of claims covered by the overspray endorsement. The court reasoned that the endorsement did not itself contain a provision for a duty to defend, and that it merely served to delete the general pollution exclusion and to replace it with a "modified definition of a 'pollutant'" that "cannot be applied, via modification to the exclusions, to the duty to defend set forth in § (I)(A)(1)(a)" of the policy. In denying Clearwater's motion for reconsideration, the trial court recognized that it "may seem counter-intuitive" (to find that a duty to defend is narrower than a duty to indemnify for covered losses), but nonetheless reaffirmed its conclusion that "[s]ince the Overspray endorsement does not provide for a duty to defend, [Home-Owners] is not obligated to assume the costs of [Clearwater's] defense." Rather, the trial court held that the "only duty to defend provided for by the policy is present only in the unendorsed language of the body of the policy, which is not affected by the re-definition of 'pollutant' contained in the Overspray endorsement."

Following a non-jury trial, the trial court found that Clearwater had not applied or dispersed a "pollutant," as defined in the policy, because the testimony showed that bentonite mixed with water is non-toxic. Accordingly, the trial court concluded that the property damage alleged in Maple Forest Township's complaint was not covered under the overspray endorsement and dismissed Clearwater's third-party complaint.

II. STANDARD OF REVIEW AND GENERAL PRINCIPLES

We review de novo the decision to grant a motion for summary disposition, *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206-207; 828 NW2d 459 (2012), as well as the proper interpretation of a contract, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Summary disposition under MCR 2.116(C)(10) is appropriate when, considering "the evidence and all legitimate inferences in the light most favorable to the nonmoving party," *Coblentz v Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006), "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law," MCR 2.116(C)(10).

We review a trial court's factual findings following a bench trial for clear error, and the trial court's legal conclusions de novo. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007).

"Insurance policies are contracts and, in the absence of an applicable statute, are 'subject to the same contract construction principles that apply to any other species of contract.'" *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012) (citation omitted). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties," *Klapp v United Ins Group Agency*, 468 Mich 459, 473; 663 NW2d 447 (2003) (citation and internal quotation marks omitted), and "unambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy," *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005). "[C]ontractual terms must be construed in context and in accordance with their commonly used meanings." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 294; 778 NW2d 275 (2009). Although "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured[,] . . . [c]lear and specific exclusions must be given effect." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992) (citations omitted).

III. COVERAGE

On appeal, Clearwater does not appear to contest the trial court's determination, on summary disposition, that the pollution exclusion set forth in § I.A.2.f(1)(b) of the policy applied so as to bar Clearwater's claim generally.[1] Instead, Clearwater focuses its argument on the trial court's subsequent determination, after trial, that coverage also was not afforded under the overspray endorsement.

The overspray endorsement requires Home-Owners to "pay those sums which [Clearwater] become[s] legally obligated to pay for 'property damage' caused directly by immediate, abrupt and accidental: . . . 'Overspray' during [Clearwater's] application or dispersal of 'pollutants' which are intended for and normally used in [Clearwater's] operations."

In concluding that the bentonite and water solution that Clearwater sprayed for drilling purposes was not a "pollutant," the trial court relied on testimony from Clearwater's owner, who testified to his belief that a mixture of bentonite and water was not environmentally harmful and would not be expected to cause injury to people or property. The trial court also relied on testimony from the son and employee of Clearwater's owner, who testified that the bentonite solution is not hazardous or toxic. The trial court further noted that this testimony was consistent with this witness's affidavit submitted in opposition to Home-Owners' motion for summary disposition, in which the witness averred, "It is undisputed that bentonite is not toxic and cannot be made toxic by mixing it with water."

[1] We further find no error in the trial court's determination that the substance that damaged the township hall was a "pollutant" under the definition of the policy, and that because the pollutant emanated from a septic system, the property damage arose out of the "dispersal, seepage, migration, release or escape" of that substance ". . . from [a] premises, site or location which . . . was at any time used by . . . others for the handling, storage, disposal, processing or treatment of waste," and thus was excluded from coverage under § I.A.2.f(1)(b) of the policy.

On appeal, Clearwater does not argue that the trial court's factual findings following the trial were clearly erroneous, or that the trial court erred in interpreting or applying the language of the overspray endorsement. Nor does Clearwater present any evidence rebutting the trial testimony that bentonite mixed with water is not hazardous or toxic, or evidence supporting the position that it otherwise applied or dispersed a "pollutant" that was "intended for and normally used" in its operations. To the contrary, Clearwater's own witness testified that protective gear is not required when handling bentonite and water, and that he would not expect the bentonite solution to cause harmful effects to persons, property, or the environment. See *Hastings Mut Ins Co*, 286 Mich App at 294 (the terms "irritant" and "contaminant," when used to define "pollution" in a pollution-exclusion clause, commonly mean substances that cause or are expected to cause "injurious or harmful effects to people, property, or the environment").

Instead, Clearwater contends that the trial court had previously (at summary disposition) held that the substance it had "oversprayed" was a pollutant, and that the trial court erred in not abiding by that previous holding. Contrary to Clearwater's assertion, however, the trial court never ruled that Clearwater sprayed a "pollutant." As Clearwater acknowledges in its appellate brief, the trial court previously ruled that "[t]here is no question of fact that the bentonite solution which [Clearwater] sprayed into the well *became a pollutant once it was tainted with septic waste*." (Emphasis added.) In fact, the trial court denied in part Home-Owners' motion for summary disposition for the express reason that there was "a question of fact as to whether the bentonite solution was a 'pollutant' when it was dispersed by [Clearwater]."

Accordingly, Clearwater has failed to show that the trial court erred in concluding that the property damage alleged in Maple Forest Township's complaint was not covered under the overspray endorsement because the bentonite mixture, prior to being contaminated with sewage, was not a "pollutant."

IV. DUTY TO DEFEND

Clearwater next argues that the trial court erred in concluding that Home-Owners had no duty to defend Clearwater in the Maple Forest Township suit. We agree.

Pursuant to § I.A.1.a. of the policy, Home-Owners agreed to pay for "'property damage' to which this insurance applies," and to defend Clearwater against any suit seeking "those damages." Thus, if Maple Forest Township's suit against Clearwater sought damages that were absolutely not covered by the policy, then Home-Owners would not have a duty to defend the suit. See *Protective Nat'l Ins Co of Omaha v Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991) ("[I]f the policy does not apply then the insurer does not have a duty to indemnify or defend the insured.").

However, as this Court discussed in *Detroit Edison Co v Mich Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980), the duty to defend is broader than the duty to indemnify and extends to suits that even *arguably* come within the policy coverage:

> The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are

> groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. [Citations omitted.]

It is the duty of this Court to enforce the plain language of the parties' agreement as written. *Rory*, 473 Mich at 491. Therefore, the relevant question whether Maple Forest Township's theory of liability arguably falls within the coverage of Clearwater's policy. We conclude that it does.

Clearwater argues that Maple Forest Township did not specifically allege in its complaint that the township hall was damaged by a "pollutant" or "waste."

Maple Forest Township's complaint reads as follows, in pertinent part:

> On or about September 8, 2010, [Clearwater] began drilling operations. While drilling, [Clearwater] struck and damaged [Maple Forest Township]'s existing dry well and septic system. The existing septic system was filled with drilling mud and water which then invaded the Township Hall, necessitating repairs and/or replacement of [Maple Forest Township]'s facilities.

The trial court found that Maple Forest Township's complaint "does allege, clearly and unambiguously, that the damage was caused by a substance which escaped from the confines of a septic tank." However, the complaint does not allege that the mud and water that invaded the Township Hall was mixed with human waste and therefore a "pollutant." We find that while the trial court was correct that the complaint unambiguously alleged that mud and water passed through a septic system, it erred in concluding that therefore the complaint unambiguously alleged damages from a pollutant not covered by the policy. Although the duty to defend "cannot *be limited by* the pleadings," *Detroit Edison Co*, 102 Mich App at 141-142, the duty to defend "is measured by the allegation in the pleadings" and "does not depend upon [the] insurer's liability to pay." *Guerdon Indus, Inc v Fidelity & Cas Co of New York*, 371 Mich 12, 18; 123 NW2d 143 (1963).

Further, the trial court also determined that a question of fact existed as to whether coverage existed under the policy due to the overspray endorsement. See Section III, *supra*. However, the trial court held as a matter of law that the language of the endorsement did not provide a duty to defend against claims for damages under the endorsement. We find this interpretation contrary to the plain language of the overspray endorsement and the policy. The endorsement's very first statement is "It is agreed the coverage for 'property damage' liability with respect to your operations is extended as follows." The endorsement then modifies the

policy's coverage for "property damage" by providing that Home-Owners will pay those sums for which Clearwater becomes legally obligated due to "property damage" caused by, among other things, accidental overspray of pollutants.[2] The main policy provides that Home-Owners is obligated to defend suits for property damage under the policy. Thus, reading the relevant terms of the overspray endorsement and the main policy in context, *Hastings Mut Ins Co*, 286 Mich App at 294, we conclude that the overspray endorsement expands coverage for certain types of "property damage" that would otherwise fall within the pollution exclusion. It does not relieve Home-Owners of its duty to defend suits seeking damages as a result of "property damage" when that damage is arguably caused by pollutant overspray. The trial court erred in holding to the contrary.[3]

Moreover, the trial court denied Home-Owners' motion for summary disposition as to whether it was liable under the overspray endorsement, and the matter proceeded to trial on that issue. Under such circumstances, we conclude that Clearwater presented a claim that at least arguably fell within the policy coverage. Consequently, we hold that Home-Owners had a duty to defend.

In *Polkow v Citizens Ins Co of Am*, 438 Mich 174, 180; 476 NW2d 382 (1991), our Supreme Court held that until "sufficient factual development" had occurred to allow the trial court to conclude whether damages sought against the plaintiff fell within the pollution exclusion to the policy, "[f]airness requires that there be a duty to defend" pursuant to policy language almost identical to the policy language at issue in the instant case. Here, it was such "factual development" that allowed the trial court to conclude, after trial, that the overspray endorsement did not apply. Essentially, therefore, because the general pollution exclusion applied in the absence of the overspray endorsement, it was such factual development that allowed the trial court to ultimately conclude that the pollution exclusion effectively barred Clearwater's claim.

Polkow stands for the proposition that when a claim for damages requires factual development to determine whether or not those damages are covered under an insurance policy or subject to an exclusion, the duty to defend is not relieved until that determination can properly be made. Thus, the fact that the trial court ultimately concluded that the substance that infiltrated the township hall was a "pollutant" under the policy, and that the overspray endorsement did not apply to provide coverage (while bearing on Home-Owners' coverage obligations, see Section III, *supra*) does not relieve Home-Owners of its duty to defend Clearwater against "suits"

---

[2] Contrary to the trial court's characterization, the overspray endorsement does not "re-define" or "modif[y the] definition of a 'pollutant.'" Rather, the overspray endorsement expands the policy's coverage, and as to that expanded portion of coverage, replaces the general pollution exclusion with the specific pollution exclusion set forth in the endorsement. The policy's definition of "pollutant" remains unchanged.

[3] Home-Owners candidly and properly acknowledges on appeal that the trial court erred in holding that there would not be a duty to defend even if there were liability coverage under the overspray endorsement.

seeking damages arising from "property damage" as defined in the main policy and overspray endorsement.

Since the "property damage" in question arguably came within the scope of coverage provided by Clearwater's policy with Home-Owners, Home-Owners was obligated to defend Clearwater. The trial court erred in granting partial summary disposition to Home-Owners on this issue, and instead should have granted partial summary disposition to plaintiff. MCR 2.116(I)(2).

V. CONCLUSION

We affirm the trial court's grant of partial summary disposition to Home-Owners with respect to its coverage obligations. We further affirm the trial court's judgment following trial with respect to the lack of coverage afforded by the overspray endorsement. We reverse the trial court's grant of partial summary disposition to Home-Owners with respect to its duty to defend. We remand for entry of partial summary disposition in favor of Clearwater with respect to Home-Owners' duty to defend, and for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Mark T. Boonstra